IN THE

United States Circuit Court of Appeals for the Ninth Circuit

M. A. PHELPS LUMBER COMPANY, a Corporation,

Appellant,

vs.

McDONOUGH MANUFACTURING COMPANY, a Corporation,

Appellee.

No. 2167

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S REPLY BRIEF.

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Throughout appellee's brief there are many statements of fact which are not borne out by the record. In most cases the record is not referred to in confirmation of such statements. In many cases where reference is made to the record there is nothing found supporting the statements. It is not intended in this brief to point out such mis-statements, since the facts, as we understand them, are disclosed in the opening brief. The suggestion here made is only that the court should not accept as facts statements so made unless supported by

the record. There is no intention on appellant's part to admit such statements.

Appellee's discussion (Brief, 7) as to what constitutes a waiver of lien has no bearing in this case.

In Washington no lien attaches to realty unless that which was furnished and became the basis of the claim of lien, became a fixture or, in other words, lost its character as personalty and became a part of the realty. Appellant, in its opening brief, showed beyond question that whether a chattel becomes a fixture depends upon the manner *of annexation* and *the intention of the parties* making the annexation. The only question presented, then, is: Did the machinery undergo a change from chattels to fixtures?

Under the authorities cited by Appellant it is shown that the intention of the parties is of primary importance. Appellant also cited a long list of authorities holding that where title to the chattels remains in the vendor, *it is evidence of intention that the chattels were not to become a part of the realty or,* which is the same thing, *were not to become fixtures.*

The Appellee attempts to meet that contention and those authorities by citing a number of authorities to the effect that retention of title by the vendor does not amount to a waiver of a right of lien.

Appellant does not claim that a right of lien is waived or lost by retaining title or even that it is evidence of a waiver. Appellant does claim that a lien on realty cannot come into existence until chattels are so

affixed as to become a part of the realty; that they do not become so affixed if it is the intention of the parties that they shall not; and, that retention of title is evidence of that intention.

The first question to be determined is whether or not there is any foundation for a lien. If there is a foundation for a lien then the question of waiver or loss of lien may become of importance. If there is no foundation then the question of waiver or loss of lien becomes immaterial. Appellee's authorities do not go to the foundation; a question of fixtures was not involved in them.

The Case Manufacturing Co. vs. Smith, 40 Fed, 339, seems to be relied upon chiefly. It is not in point. Whether or not the chattels became fixtures was not called in question in that case. The only question involved was whether a vendor's lien and a statutory lien were inconsistent. Appellant herein contends that no statutory lien ever came into existence because the chattels never became fixtures. If there were evidence of an intention contrary to that shown by the provision in the contract, for retention of title in the vendor, and sufficient to outweigh it, then the question involved in the Case Manufacturing Co. case might be before this Court. Now it is not.

The above criticism applies to every case cited by Appellee (Answer Brief, pp. 7-16) and to the authorities cited by Cyc. in support of the rule quoted from 27 Cyc. 276.

It will be noted that the two lines of authorities have

nothing in common. No mention is made in cases of the one class of authorities in the other. Appellee's authorities have no bearing on appellant's contention. Both propositions of law are well settled and the statement that Appellant's authorities represent the minority and Appellee's the general rule was no doubt made by reason of confusion of the two propositions.

Appellee has cited Cyc. Federal and Michigan cases, among others, on the waiver of lien proposition. Appellant cited Cyc., Federal and Michigan cases, among others, laying down the rule applicable to this case. There is no conflict of authorities. The two lines of cases simply do not relate to the same subject matter. Appellee does not meet Appellant's contention — that the retention of title was evidence (conclusive in this case because there was none to the contrary) of an intention that the chattels should not become a part of the realty; that a lien attaches to realty only when the chattels, upon which the claim of lien is founded, become a part thereof; and, that therefor a lien never existed. There must be a fixture before there can be a right to a lien, and there must be a right to a lien before there can be a waiver or loss of a lien. The evidence shows that the machinery never became fixtures in this case.

Reference is made by appellee (Brief, 20) to a statement that Mr. Edge, of counsel for appellee, made at the trial concerning an amendment he proposed to make in the amended bill. If it should be assumed that this statement was made in the hearing of appellant's attorneys it nevertheless appears that Mr. Edge did not do

what he said he had done. The amendment was never made (Transcript, 2-8), and until there was an amendment there was nothing new to which appellant was required to plead nor anything new to which it was required to direct its evidence. It is apparent since the amendment was not made that counsel for appellee had a change of heart and concluded not to amend. The cause was tried on the pleadings as they existed. The lower court had no authority after the cause was tried to amend the pleadings to appellant's prejudice. By the pleadings on which the cause was tried a certain amount was claimed and there was an admission of a certain credit; while the pleadings remained in this condition it was not incumbent upon appellant to introduce evidence to prove that which was already admitted by appellee.

Appellee, at pages 23 and 24 of its brief, quotes from an affidavit made by its counsel, Mr. McCarthy, and concludes that certain portions of that affidavit are not denied because not specifically referred to in a reply affidavit (Brief, 25). It will be observed that in the opening affidavit filed by appellant (Brief, 22) it is alleged: "and no notice of such an application was ever given defendant or its solicitors, and the said defendant and its solicitors were not represented or present at the time any such order was made * * * and defendant and this affiant had no knowledge of same at any time until mention was made thereof to affiant by Joseph F. McCarthy, solicitor for complainant, which suggestion was made about two weeks prior to this date." That affidavit was made on June 24, 1912. There was

no necessity for appellant to reiterate a denial that had already been made in the first affidavit. It is said (Brief, 26) that in the rebutting affidavit it is conceded that appellant consented to appellee amending one paragraph of the bill of complaint. This is not denied, although there is nothing in the record to show same except the admission in said affidavit. However, as above stated, the amendment never was made to the bill and at that time presumbably appellee abandoned its intention to amend. The pleadings remained the same and necessarily the proof should be the same. Appellant was meeting the issues as made in the pleadings and evidence would not have been admitted to establish that which was already conceded

Appellee makes reference to a statement of date July 22, 1911, taken from appellant's books (Brief, 31-33). It will be noted that the amount shown on the statement, after giving credit only for the notes and cash and freight paid, is but $470.51 more than the amount claimed by appellee in its amended bill to remain unpaid, but when credit is taken as shown by this statement for the materials which appellee did not furnish and the other items shown on the second page of this statement of July 22, 1911, it appears that instead of the balance shown by such statement due appellee on the open account being greater than claimed in the amended bill, it is $1958.49 less than the amount claimed by appellee in the amended bill. Further, this statement purported only to be those things that were already entered on appellant's books. This statement was not introduced by appellee for the purpose of showing the

amount due it, but the purpose was to show that at said time appellant was making no claim for damages (Transcript, 230, 259, 260, 261, 304, 307, 308 and 309). At no time during the trial was there any issue made on the amount of the actual payments. The payments were conceded as alleged in the amended bill and there was nothing to prove in that respect, nor was there any attempt to prove anything on that point.

Appellee, at pages 38 and 39, suggests certain ways in which appellant delayed appellee in the performance of the contract. It will be noted that practically all here referred to occurred before the contract was finally consummated between appellant and appellee. What may have happened before the contract was made certainly would have no bearing nor would the fact that there may have been additional contracts afterwards made for additional machinery have any bearing. The fact that appellee accepted an order for additional machinery after the contract had been made would be no excuse for its failure to perform the original contract.

Respectfully submitted,

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